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NAUM MORGOVSKY

IN THE UNITED STATE DISTRICT COURT,  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

<b>UNITED STATES OF AMERICA,</b>	)	Case No. Cr-16-0411 VC
	)	
Plaintiff	)	<b>DEFENDANT NAUM</b>
v.	)	<b>MORGOVSKY'S MOTION IN</b>
	)	<b>LIMINE TO EXCLUDE "OTHER</b>
<b>NAUM MORGOVSKY, et. al.,</b>	)	<b>CRIMES EVIDENCE"</b>
	)	
Defendants	)	Date: May 2, 2018
	)	Time: 8:30 a.m.
	)	Place: Judge Chhabria
	)	

**INTRODUCTION**

On January 30, 2018, the government filed a document titled "United States Notice of Rule 404(B) Evidence." In this Notice, the Government signaled its intention to offer in evidence at the trial of Naum and Irina Morgovsky 13 classes, or categories, of evidence concerning alleged wrongdoing, not included in the superseding indictment upon which the Morgovskys are scheduled to begin trial on May 9, 2018 (jury selection on May 2). These uncharged allegations refer, often in vague terms, to such disparate matters as Mr.

1 Morgovsky's involvement in night vision related activities "as early as the late 1990s,"  
2 allegations that Mr. Morgovsky aided Mr. Migdal in an attempt to defraud his mortgage lender,  
3 and Mr. Morgovsky's alleged failure to pay his taxes over the years. Some of the listed items  
4 do not allege criminal conduct at all, such as the claim that Mr. Morgovsky "used other  
5 businesses" to hold the title to his car, and that the Morgovskys' personal vehicles are "owned  
6 in the name of a corporation they control." Some are the subject of Counts 1 through 5 of the  
7 superseding indictment which were improperly joined with the Export Control Act and money  
8 laundering violations now proceeding to trial, and have accordingly been severed out of this  
9 trial.  
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12 The Government's attempt to introduce evidence of this uncharged conduct is  
13 misguided and should be rejected by the Court. This is true regardless of whether the  
14 Government's Notice is characterized as an attempt to introduce evidence pursuant to  
15 F.R.Crim.404(b), or under the theory that the proffered evidence is somehow "inextricably  
16 intertwined" with the crimes charged. The evidence in question has no legitimate place in the  
17 trial of the Morgovskys on charges that they violated the Export Control Act and that Mr.  
18 Morgovsky laundered money derived from such violations.  
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## 20 DISCUSSION

21 Since filing its Notice on January 30, 2018, the Government has not re-approached the  
22 question of "other crimes" evidence and its place, if any, in the upcoming trial. On March 31,  
23 2018, counsel for Mr. Morgovsky wrote the Government a letter calling attention to the  
24 deficiencies in the Government's Notice and requested that the prosecution file a motion  
25 seeking admission of any materials it thinks admissible, providing a clear legal basis for this  
26 relief. The Government has not responded to this request, other than to say it was unaware of a  
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1 requirement that it file a Motion specifically seeking the admission of “other crimes” evidence,  
2 but that the Prosecutor would conduct research concerning the matter.

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4 Under Section 404(b)(1) of the F.R.Crim.Proc., evidence of a crime, wrong, or other act, is  
5 not admissible to prove a person’s character in order to show “that on a particular occasion the  
6 person acted in accordance with that character.” This is an application of the venerable rule that  
7 character evidence is generally inadmissible against a defendant in a criminal trial because of the  
8 prejudice inherent in such evidence and the confusion and delay the introduction of such evidence  
9 may entail. Rule 404(b)(2) allows the admission of evidence of other wrongful acts if they are  
10 relevant to prove other elements of the offense on trial, notably motive, opportunity, intent and  
11 other material facts at issue. However, the Court must carefully scrutinize such evidence to ensure  
12 that it is not primarily directed against the character of the accused and that its legitimate  
13 relevance, if any, is not outweighed by the prejudice that will result. Thus, even evidence  
14 admissible under Rule 404(b) may be excluded if the Court finds its relevance outweighed by  
15 prejudice pursuant to Section 403. *U.S. v. Preston*, 873 F.3<sup>rd</sup>, 829, 840, (9<sup>th</sup> Cir. 2017).  
16 Federal Rule of Evidence 403 states that “[a]lthough relevant, evidence may be excluded if its  
17 probative value is substantially outweighed by the danger of unfair prejudice, confusion of the  
18 issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless  
19 presentation of cumulative evidence.

20 When seeking to introduce other “acts” Section 404(b) evidence for the purpose of  
21 proving intent, the proposing party must show that “the other act is similar to the offense  
22 charge” *U.S. v. Hadley*, 918 F.2<sup>nd</sup>, 848-851, (9<sup>th</sup> Cir. 1990). This showing of similarity is  
23 necessary because unless the other act is sufficiently similar to the offense on trial “it does not  
24 tell the jury anything about what the Defendant intended ... unless, of course, one argues  
25 (impermissibly) that the [other] establishes that the Defendant has criminal propensities.” *U.S.*  
26 *v. Miller*, 874 F.2<sup>nd</sup>, 1255, 1269, (9<sup>th</sup> Cir. 1989). In introducing other acts evidence for a  
27 supposedly legitimate purpose, the Government must always show that the act tends to prove a  
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1 material element or point, and that the act is not too remote in time from the crime charged.  
2 *United States v. Preston*, supra, 873 F.3<sup>rd</sup> at 841. Our courts have employed a four part test to  
3 determine if evidence may be admitted under Rule 404(b): (1) sufficient evidence must exist  
4 for the jury to find that the defendant committed the other acts; (2) the other acts must be  
5 introduced to prove a material issue in the case; (3) the other acts must not be too remote in  
6 time; and (4) if admitted to prove intent or knowledge, the other acts must be similar to the  
7 offense charged. See, *United States v. Bradley*, 5 F. 3<sup>rd</sup>, 1317 (9<sup>th</sup> Cir. 1993).  
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10 In *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9<sup>th</sup> Cir. 1982) the court held that “[t]he  
11 Government, however, must carry the burden of showing how the proffered evidence is relevant to  
12 one or more issues in the case; specifically, it must articulate precisely the evidential hypothesis by  
13 which a fact of consequence may be inferred from the other acts evidence.” *Id.* The government's  
14 letter to the defense does not come close to ‘articulat[ing] precisely the evidential hypothesis’  
15 which makes this uncharged acts evidence admissible. As to each of the uncharged acts of alleged  
16 misconduct, the government quotes Rule 404(b) in the hope that this mere recitation will make the  
17 evidence admissible.

18 In *Huddleston v. United States*, 485 U.S. 681, 689 n. 6 (1988) , the Court indicated that "the  
19 strength of the evidence establishing the similar act is one of the factors the court may consider  
20 when conducting the Rule 403 balancing". Fed.R.Evid. 404, Advisory Committee Notes on 1991  
21 Amendments provides that “[t]he court in its discretion may, under the facts, decide that the  
22 particular request or notice was not reasonable, either because of the lack of timeliness or  
23 completeness”. While it can be argued whether the Government’s notice was timely, it is definitely  
24 incomplete and, in addition to failing to “articulat[e] precisely the evidential hypothesis” which  
25 makes this uncharged acts evidence admissible, it fails to allow this Court to conduct the Rule 403  
26 balancing.  
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1 The Government's Notice fails to satisfy the requirements of Rule 404(b). While the  
2 Notice catalogs a number of items, or classes of evidence it would like to introduce, it provides  
3 no explanation of how this evidence relates specifically to the present charges. The indictment  
4 charges the Morgovskys with conspiring to unlawfully export specifically identified night  
5 vision related items, and charges Mr. Morgovsky with laundering the proceeds of that specific  
6 activity. The Government's Notice alleges that "as early as the late 1990s," the Morgovskys,  
7 with "other unindicted co-conspirators" conspired to export defense articles to certain  
8 European countries without obtaining the required license. This is really not notice of anything  
9 as it provides utterly no specific information concerning what the Government is talking about.  
10 The "late 1990s" transpired from 18 to 20 years ago and we have no idea what witnesses or  
11 exhibits the Government might summon to prove such a charge, beyond the random gossip of  
12 other individuals.  
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16 The Government claims that, again "as early as the late 1990s" the Morgovskys  
17 exported "dual-use" items to a range of countries, including Russia without the required  
18 licensing and that once in March, 2001, Mr. Morgovsky "was stopped" when entering the  
19 United States by Customs based on a night vision component he allegedly possessed. The fact  
20 that Mr. Morgovsky was "stopped" does not prove anything and the Notice is bereft of any  
21 details that would enable him to rebut this charge. In Item 4 of its Notice, the Government  
22 claims that the Morgovskys had at some unspecified time conspired with other unidentified  
23 people to smuggle night vision equipment into Russia to avoid Russian import tariffs, but the  
24 Government fails to explain what that conspiracy entailed, who was involved, its operative  
25 dates, and how it specifically relates to export violations charged in the present case. At several  
26 places in its Notice, the Government alleges that Mr. Morgovsky committed identity theft  
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1 against deceased persons in various connections and includes the erroneous claim that he was  
2 convicted in 2008 of the crime of identity theft. See Items 5 and 8. Mr. Morgovsky is charged  
3 with aggravated identity theft in connection with his alleged involvement in the short sale of  
4 two Hawaii properties by Mark Migdal in Counts 1 through 5 of the original indictment in this  
5 case. But these charges have been severed away from the present trial because they were  
6 improperly joined. Mr. Morgovsky is not charged with identity theft in the pending counts now  
7 proceeding to trial and it would clearly be unduly prejudicial and time consuming to permit the  
8 Government to prove up its bank fraud case during this trial, which is about alleged export act  
9 violations and alleged money laundering.  
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12       Some of the items referenced by the Government in its Notice are not even about  
13 allegedly criminal conduct, such as Mr. Morgovsky's use of a storage facility in Chicago to  
14 house night vision equipment which was not being exported (Item 6), Mr. Morgovsky's use of  
15 "other businesses" to hold title to some of his assets, including a vehicle, and the Morgovskys'  
16 use as a "nominee owner" of the home in which they reside in Hillsborough, California. The  
17 Government wants to present evidence that the Morgovskys have failed to file income tax  
18 returns since 2001 and that they have committed "affirmative acts of evasion with respect to  
19 federal income taxes owed." These acts are enumerated in Item 13(a) through (d) and amount  
20 to an attempt by the Government, in this trial, to prosecute the Defendant for a crime with  
21 which he has never been charged. Tax prosecutions are complex and multi-faceted, involving  
22 voluminous details about a defendant's personal and business income, his expenditures and  
23 other facts that would have to be developed in a proper tax prosecution. The Government seeks  
24 to avoid this complexity by throwing these unformed accusations against the Defendant under  
25 the rubric of Section 404(b).  
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1 In *Duran v. City of Maywood*, 221 F.3<sup>rd</sup> 1127 (9th Cir. 2000), the court excluded Rule  
2 404(b) evidence stating in pertinent part:

3 “In this case, the district court laid out this test and then stated that even if all the  
4 factors under Rule 404(b) were met, it believed that the evidence should be  
5 excluded under Rule 403 for two independent reasons. First, ‘the marginally  
6 probative value of this evidence is substantially outweighed by the danger of unfair  
7 prejudice.’ Second, in order to admit evidence of the other shooting, the court  
8 would have to have a ‘full-blown trial within this trial.’ The court noted that  
9 according to one of the Defendants’ attorneys, an inquiry into the second incident  
10 would require ‘the testimony of eighteen to twenty-three witnesses, as well as no  
11 less than four experts.’ The court therefore concluded that ‘the marginal value of  
12 the evidence is ‘substantially outweighed by the danger of . . . confusion of the  
13 issues, or misleading the jury, or by consideration of undue delay, [and] waste of  
14 time.’”

15 This is exactly what will happen if the 404(b) evidence is admitted in the present case.

16 Defendant Naum Morgovsky asserts that due to the manifest inadequacy of its 404(b)  
17 Notice, the Government should be precluded from presenting “other crimes” evidence against  
18 him during this trial. At a bare minimum, the Court should require the Government to provide  
19 the Court and counsel for the Defendant with a list of all contemplated Rule 404(b) evidence,  
20 providing specific information, including the names of witnesses, summary of their expected  
21 testimony, the precise dates of the acts relied upon, and any related documentary evidence  
22 concerning these charges. See, *U.S. v. Kilroy*, 523 F. Supp. 206, 216 (E.D. Wis., 1981). As part  
23 of this showing, the Government must show how the proffered evidence is relevant to one or  
24 more issues in this case, articulating precisely the evidential hypothesis by which a fact of  
25 consequence may be inferred from the other acts evidence. See, *U.S. v. Hernandez-Miranda*,  
26 601 F.2<sup>nd</sup>, 1104, 1108 (9<sup>th</sup> Cir. 1979). Even if the Government provided these specifics at this  
27 late date, it is doubtful whether the defense could fairly be required to face and rebut such  
28 charges, but at least it would assist the Court in assessing the admissibility of the evidence in  
an orderly manner.

1 The Government, of course, has itself recognized the inherent weakness of its Rule  
2 404(b) showing by claiming that the vaguely described incidents it refers to in its Notice are  
3 alternatively admissible as “inextricably intertwined” with the charges on trial. (Government’s  
4 Notice, page 2.) This contention, however, does not assist the Government, because, in this  
5 Circuit, the “inextricably intertwined” exception applies only when (1) particular acts of the  
6 Defendant “are part of ... a single criminal transaction,” or when (2) “other acts evidence ... is  
7 necessary in order to permit the Prosecutor to offer a coherent and comprehensive story  
8 regarding the commission of the crime. *U.S. v. Beckman*, (298 F. 3<sup>rd</sup> 798, 791 (9<sup>th</sup> Cir. 2002)).  
9 Neither basis for applying the inextricably intertwined exception to Rule 404(b) applies here.  
10 The ‘same transaction’ category applies to evidence that is temporally close to the charged  
11 conduct. See *United States v. Vizcarra-Martinez*, 66 F.3<sup>rd</sup> 1006, 1012 (9<sup>th</sup> Cir. 1995) (citing  
12 contemporaneous drug transactions as example). The Ninth Circuit has even said that evidence  
13 “which occurred six months after the charged conduct took place, is arguably too far removed  
14 in time to constitute a part of the charged transaction.” *United States v. Anderson*, 741 F.3<sup>rd</sup>  
15 938, 950 (9<sup>th</sup> Cir. 2013); *United States v. DeGeorge*, 380 F.3<sup>rd</sup> 1203, 1220 (9<sup>th</sup> Cir. 2004) (past  
16 evidence tending to prove charged fraud too temporally removed to be part of same  
17 transaction). In a similar vein, conspiracy cases admitting evidence under the “same  
18 transaction” category indicate that the evidence must fall within the temporal scope of the  
19 charged conspiracy. *United States v. Yagi*, (N.D. Cal. Oct. 17, 2013) 2013 WL 10570994, at \*9  
20 (evidence falling outside the temporal scope of the charged conspiracy is not inextricably  
21 intertwined with the conspiracy).  
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27 The conduct alluded to in the Government’s Notice, having no direct bearing on the  
28 charges, does not meet this standard. That conduct, as nearly as we can tell from the



Government's vague description, is not part of a single criminal transaction and does not advance the Prosecutor's ability to make a coherent presentation of the Government's charges on trial.

### CONCLUSION

Rules 403 and 404(b) were designed to ensure defendants a fair and just trial based upon the evidence presented, not upon impermissible inferences of criminal predisposition or by confusion of the issues. It is inconceivable that exposing the jury to any and all Rule 404(b) evidence listed in the Government's notice would not play some significant part in the decision of all or at least some of the jurors.

For the reason as advanced herein, Defendant Naum Morgovsky respectfully submits that the Court should preclude the Government from offering "other crimes" evidence at the trial of this case as requested in the Government's January 30, 2018 Notice. At a minimum, the Court should require the Government to provide the specificity and detail concerning any "other crimes" evidence it wishes to introduce requested in this Motion, and permit Defendant to fairly face and rebut such charges. This will at least enable the Court to assess the admissibility of the evidence in an orderly manner.

Dated: April 16, 2018

Respectfully Submitted,

/s/ William L. Osterhoudt

William L. Osterhoudt